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IN THE

# Supreme Court of the United States

October Term — 1959

REEDERE BLUMENFELD G. M. B. H.,
*Petitioner,*

v.

Ruth Holley, Administratrix of the
Estate of Edward J. Holley, deceased,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

Reederei Blumenfeld, G. M. B. H., owner of the German Steamship MANFRED STANSFIELD, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on July 9, 1959

## CITATIONS OF OPINION BELOW

The memorandum opinion of the District Court printed in the appendix to appellant — below brief page 13, is reported in 165 F. Supp. 660. The opinion of the Circuit Court of Appeals, printed in the appendix hereto, infra p. 6 has at the time of writing this

petition not been published in West Federal Reporters advance sheets.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 9, 1959. The judgment of this Court is invoked under Title 28 U. S. C. Section 1254 (1).

## QUESTION PRESENTED

In Admiralty action brought by administratrix of deceased longshoreman against vessel owner under Virginia Death by Wrongful Act Statute is contributory negligence of decedent an absolute bar to recover or merely to be considerd by the Court in mitigating damages assessed against vessel owner?

## STATUTE INVOLVED

The statute involved is the Virginia Death By Wrongful Act Statute, Section 8-633 of the Code of Virginia 1950 quoted at page 10 of appellant — below brief.

## STATEMENT

On September 17, 1956, Edward J. Holley, a longshoreman, was fatally injured while assisting in the discharge of a potash cargo from the No. 2 hold of the German Steamship MANFRED STANSFIELD at South Norfolk, Virginia. On January 16, 1957 his administratrix filed a libel in the U. S. District Court for the Eastern District of Virginia on the admiralty side of that court seeking to recover damages

for her decendents death under the provisions of Section 8-633, Code of Virginia, 1950, as amended. In personam service was had on the vessel's owner, but service was never had on the vessel itself in rem. Jurisdiction in admiralty in the District Court was based on the occurrence of the accident on navigable waters of the United States.

On August 1st, 1958, the matter was tried before the U. S. District Court for the Eastern District of Virginia sitting in admiralty. On September 25th, 1958, the District Court rendered its memorandum opinion, which is fully set forth in the appendix to appellant-below brief at page 14. The District Judge dismissed the libel on the basic ground that the decedent Holley was negligent, that his negligence contributed to his death and that under the case law of Virginia contributory negligence of a decedent in an action brought under the Virginia Death By Wrongful Act Statute is a complete bar to recovery.

The Court below on July 9, 1959 reversed the decision of the District Court and remanded the case to the District Court for the application of the rule of comparative negligence.

## REASON FOR GRANTING THE WRIT

1. The decisoin of the Court below in the instant case is directly in conflict with the decisions of the Third Circuit Court of Appeals in *Hill, Admr. v. Waterman S. S. Corp.*, 1958 A. M. C. 1098, 251 F. (2d) 655, *Curtis v. Garvia Y. Cia*, 1957 A. M. C. 331, 241 F. (2d) 20, and *Klengeisen v. Costanzo Transp.*

*Co.*, 1939 A. M. C. 179, 101, F. (d) 902; the decision of the Fifth Circuit Court of Appeals in *Truelson, et al. v. Whitney & Bodden Shipping Co., Inc.*, 10 F. 92d) 412, and *Graff, et als. v. Parker Bros. & Co.* 1953 A. M. C. 2166, 204 F (2d) 705, *Graham v. S/S Novarchos Koundouriotis*, 1953 A. M. C. 2161, 206 F. (2) 223 ,and with the decision of the Sixth Circuit Court of Appeals in *Feige v. Hurley*, 89 F. (2d) 575. In all of the cases aforementioned recovery was sought in admiralty under a state Death by Wrongful Act Statute. In all of these cases, the state rule was that contributory negligence of the decednt barred recovery. In each of these cases the Circuit Court of Appeals held the state common law rule that contributory negligence of the decedent is a complete bar to recovery must be applied and not the admiralty rule of comparative negligence. The Supreme Court of Appeals of Virginia has clearly stated in *Yeary v. Holbrook*, 171 Virginia 266, at page 285 that:

> "If a plaintiff's failure to exercise due care helps to bring about or cause the injury to himsel, he cannot recover from another whose negligence co-operated or concurred with his own neglect to produce the injury."

As was stated by Circuit Judge Borah, in the Graham decision, supra, a case involving the death of a Longshoreman on a vessel in Florida water;

> "We are in no doubt that appelant's right of action * * * like other rights of action arising in admiralty under Lord Campbell's act and similar acts, is to be enforced according to the principles

of the common law and contributory negligence and the exercise of due care are absolute defenses thereunder. Without this statute the appellant could not maintain her libel because the prior maritime law conferred no right upon the personal representatives of a deceased maritime employee to recover indemnity for his death."

Under the common law of Virginia, as stated in *Yeary v. Holbrook*, supra, contributory negligence of the decedent is an absolute bar to any recovery. Whether the death be of a land laborer or a maritime laborer is immaterial. The common law rule must apply as well to latter as it must to the former.

2. The question presented is of great importance in the handling of the numerous death claims of maritime workers brought under the provisions of the various State Death by Wrongful Act statutes. In this regard there should be uniformity among the various circuits, which does not now exist.

3. The decision of the Court below is believed to be erroneous and the conflicting decisions of the Third, Fifth and Sixth Circuits correct. Furthermore, the decision below appears to be in conflict with this Court's decision in *The Tungas v. Skovgaard*, 358 U. S. 588 (1959) wherein this Court stated:

> "The decisions of this Court long ago established that when admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating state has attached."

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BARRON F. BLACK
HUGH S. MEREDITH
WALTER B. MARTIN, JR.
*Proctors for Reederei*
*Blumenfeld G. M. B. H.*

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## APPENDIX A

## OPINION OF CIRCUIT COURT OF APPEALS

SOBELOFF, Chief Judge:

While helping to unload the German SS Manfred Stansfield in South Norfolk, Virginia, Edward J. Holley, a longshoreman, was killed. His widow, as administratrix of his estate, filed a libel against the vessel and its owner charging that Holley's death resulted from the unseaworthiness of the ship and the failure to furnish the decedent a safe place to work. The District Court dismissed the libel on the ground that Holley had been guilty of contributory negligence which was held to be an absolute bar to recovery under the Vir-

ginia Code provision governing Death by Wrongful Act.[1] This appeal challenges both the court's finding of fact and its conclusion of law.

The ship docked at South Norfolk on September 13, 1956, to discharge potash which it had brought from Hamburg, Germany. At an earlier stop in Baltimore, a substantial portion of the cargo of potash had been removed from the square of number 2 hatch. When the ship arrived in South Norfolk it was noted that the cargo had not been trimmed or leveled in Baltimore. While the square of the hatch was relatively clear, the remaining potash, both fore and aft and in the wings, had been left piled 12 to 20 feet high.

By reason of its hydroscopic nature, the potash had solidified during the voyage, and in places was extremely hard, like concrete. Recognizing the difficulties and dangers involved in discharging this type of cargo, the stevedore's superintendent requested permission to use small charges of dynamite to loosen the potash — a method sometimes resorted to in such circumstances. When this request was refusd by the ship's

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[1] Code of Virginia. "Article 3. Death by Wrongful Act. Sec. 8.628. Action for death by wrongful act.—Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, or of any ship or vessel, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, or to proceed in rem against such ship or vessel or in personam against the owner thereof, or those having control of her, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation or ship or vessel which, would have been liable, if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel in rem, and her owners or those responsible for her acts or defaults or negligence to a libel in personam, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony. . . ."

officers, it was decided to employ air hammers, picks and shovels for the loosening operation.

As the potash had earlier been substantially removed from the square of the hatch, "payloaders" were lowered into the ship and Holley was assigned to operate one of them. A "payloader" is a small bulldozer with a scoop on the front which is used to bring loose cargo to the square of the hatch so that it may be loaded into the clam shall or grab of the crane. In addition to collecting loose cargo, "payloader" operators often use their scoops to assist in breaking the mass at the floor level. Holley used his scoop in this manner. While there was evidence that this is a usual method—some said the only possible method—there was other testimony, offered by the ship, to show that the practice followed by Holley is frowned upon by experienced stevedores becaus cutting away at the base of a bulk cargo creates the danger of an "overhang." There was no evidence that when he was assigned to the hold the deceased was given any specific instructions, and the testimony as to instructions on other occasions is not clear. However, it was plainly established that he was an experienced "payloader" operator.

Holley met his death when an overhanging block of potash, described as about the size of the court-room desk, fell on him and overturned the machine. The accident happened at a point where the potash was from 12 to 15 feet high. He was not at the moment actually digging or hitting the potash with his machine, and no other men were then working in the area, either on the top side of the cargo or at the floor level, picking at the potash or applying air hammers to loosen it.

Without ruling on the question of unseaworthiness or the failure to provide a safe place to work, the District Court held that the decedent's "failure to take reasonable precautions for his own safety undeniably contributd to the accident." For this reason the court dismissed the libel.

It plainly appears that there was a cave in the potash at the point where the decedent was working when he was fatally injured. There is no description of the cave as to size, and it was not established clearly when and by whom the cave and the overhang were made. There was evidence that the cave might have been created the day before, either by Holley or by someone else. There was, on the other hand, some evidence that he was digging in the cave shortly before th eaccident. Th etestimony is not altogether satisfactory for, as the District Judge commented, it is difficult to assess how much of the witnesses' recitals on the stand was mased on actual observation and how much on inferences which they drew from having seen the decedent working in or near the cave before the accident. However, the problem while not free from difficulty, is not unusual and latitude must be allowed the trier of fact who heard and observed the witnesses. We are not prepared to say that it was clearly erroneous to find that the decedent's conduct constituted "a proximate cause of he accident," contributing in some degree, in conjunction with the condition of the cargo, to its collapse and the accident which followed. *McAllister v. United States*, 348 U. S. 19 (1954); *United States v. add*, 193 F.2d 929, (4 Cir., 1952).

We turn to the question of the legal effect of the

finding of contributory negligence—whether it constitutes an absolute bar as at common law, or brings into operation the maritime rule of comparative negligence.

Since admiralty provides no remedy for the death of a longshoreman resulting from an act committed on inland navigable waters, the admiralty court must look to the state law to see if it provides relief. *The Harrisburg*, 119 U. S. 199 (1886); Death on the High Seas Act, Title 46 U.S.C.A., Sec. 761; Jones Act, 46 U.S.C.A. Sec. 688; *The Tungus v. Skovgaard*, 358 U. S. 588 (1959). The District Court ruled in this case that since under the general law of Virginia contributory negligence has been held an absolute bar to recovery, the same rule is applicabl here. In this ruling, the court followed decisions of the Third Circuit applying the Pennsylvania Wrongful Death Statute, 12 Pennsylvania Statute Annotated 1601, in *Curtis v. A. Garcia Y. Cia.*, 241 F.2d 30 (3 Cir., 1957); *Hill, Admx. v. Waterman Steamship Corp.*, 251 F.2d 655 (3 Cir., 1958) and *Klingseisen v. Costanzo Transp. Co.*, 101 F.2d 902 (3 Cir., 1939). These cases dealth with a statute somewhat different from Virginia's and, even more significantly, they were decided before *Skovgaard* and did not examine the question in light of the considerations there pointed out.

While it cannot be disputed that the Virginia Courts have declared contributory negligence a bar in suits brought under the state's wrongful death statute, all such cases arose in situations where the Virginia Common law would have applied had death not resulted. We have been unable to find any case in which the Supreme Court of Appeals of Virginia, or even a

lower court that state, has held contributory negligence a complete bar to recovery in a wrongful death action where, as sehe, the maritime doctrine of comparative negligence would have controlled if death had not ensued. Paraphrasing the Supreme Court's language in *Skovgaard*, there is no way of knowing whether Virginia would impose uniform legal standards throughout its jurisdiction, or would apply in this case rules different from those that would govern, if, instead of meeting his death aboard the ship, Holley had been killed on the adjacent dock. The district Judge did not have the benefit of the *Skovgaard* decision, which came some months later.

Even though there are no state decisions directly concerned with this point, we are not without guides in approaching the problem. It is noteworthy that the Virginia statute specifically covers, among other things, "wrongful acts or defaults of any ship or vessel" and speaks of the right "to proceed *in rem* against the ship or vessel"—a procedure available only in admiralty. It is too obvious to escape attention that the statute was drafted by one well versed in admiralty law. We find ourselves unable to reconcile the result contended for by the appellees with the language of the statute. Basically, it provide that if death is caused by an act which would have entitled the injured party to maintain an action, then the person who would have been liable for the injury will continue to be liable notwithstanding the death of the person injured. Undeniably, had Holley survived, the admiralty rule would have governed under which contributory negligence merely reduces the damages.

Since the accident proved fatal, however, it is argued that the harsh common law rule must control to bar recovery. The Second Circuit rejected this argument in *Halecki v. United New York & New Jersey S.H.P. Ass'n.*, 251 F.2d 708 (2 Cir., (1958) under the New Jersey Wrongful Death Statute, decided about the same time that the Third Circuit decided *Skovgaard*.

Speaking for the court in *Halecki*, Judge Hand said:

> ". . . Although, as we have said, we are not dealing with 'federal maritime law,' we should remember that so far as we can we ought to construe the statute so as to avoid capricious and irrational distinctions. We leave open whether New Jersey is without power to take as much or as little of the rights 'rooted in federal maritime law' as it chooses as the model for the right it confers upon the next of kin; but the courts of that state have never passed upon the question and to deny the exemption [from contributory negligence] to the next of kin seems to us to the last degree capricious and irrational. . . . We are aware that *Curtis v. A. Garcia*, 241, F.2d 30, 36* is to-th econtrary, but as neither if not *O'Leary v. United States Lines Co.*, supra, is authoritative, we are free to choose. Obviously, the answer is not certain; we musth do as best we can with what we have, and We hold that the New Jersey statute should be construed as taking over as a part of the model it accepted the exemption of contributory negligence as a bar." (p.713)

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*This is one of the Third Circuit cases relied on by the appellees here, see Supra.

This part of the case was affirmed by the Supreme Court on the same day as *Skovgaard*, in *United Pilots Ass'n. v. Halecki*, 358 U. S. 613 (1959) although the judgment was vacated and the case remanded on other grounds.[2]

A like interpretaion of the Virginia statute seems to us natural and correct. The State is one with considerable marine business. A declared purpose of the enactment was, we repeat to preserve rights which the decedent would have had if his injuries had not proved fatal. What the Second and Third Circuits found implicit in the New Jersey Wrongful Death Statute, i.e., the rule of comparative negligence where the injury resulting in death occurs on navigable waters of the state, is even more unmistakably indicated in the language of the Virginia statute.[3].

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[2] Dealing with the same New Jersey statute, the majority of the Third Circuit in *Skovgaard v. The M/V Tungus*, 252 F.2d 14 (3 Cir., 1957) held that the warranty of seaworthiness, also a principle rooted in the admiralty law, was included within the meaning of "wrongful act, neglect or default." This conclusion was affirmed by the Supreme Court in *The Tungus v. Skovgaard*, 358 U. S. 588 (1959).

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[3] We set forth here the relevant portion of the New Jersey statute, for comparison with the Virginia statute, for which see Footnote 1. New Jersey Statute Annotated 2A 31-1

> "When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages to the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime."

If presented with this problem we think that the Supreme Court of Appeals of Virginia would hold that this statute was intended not only to take away from the wrongdoer the common law immunity resulting from the death of an injured party, but to grant recovery in all instances where a decedent would have recovered. The statute appears nto to concern itself with which law, local or maritime, would have supported the recovery, but only whether there would have been a recovery.

It follows therefore that the judgment of the District Court must be reversed and the case remanded for the application of the rule of comparative negligence. In measurin gthe extent to which the decedent's negligence contributed to his death, regard should be had for the admonition of Mr. Justice Holmes in *Schlemmer v. Buffalo, Rochester, &c. Ry.*, 205 U.S. 1, 12-13 (1907).

> ". . . unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name. . . ."

Bearing this in mind, the contributory negligence of the decedent is a defense *pro tanto;* but assumption of risk is not to be charged against him.

On remand it will become necessary for the court to making findings on unseaworthiness and failure to provide a safe place to work. While the District Court based its disposition of the case solely on the decedent's

contributory negligence and found it unnecessary to decide other questions, unseaworthiness was discussed. We neither approve nor disapprove at this time any intimations in the District Court's opinion as to the law or the facts pertaining to this phsae of the case, and the District Court is at liberty in its discretion to permit further testimony to me offered by either side.

*Reversed and remanded for further proceedings not inconsistent with the views expressed in this opinion.*

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JAMES R. BROWNING, Clerk

In The

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM—1959

No. 358.

REEDEREI BLUMENFELD G. M. B. H.,
*Petitioner*

v.

RUTH HOLLEY, Administratrix of the
Estate of EDWARD J. HOLLEY, Deceased,
*Respondent*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT**

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FINE, FINE, LEGUM, WEINBERG & SCHWAN
Law Building
147 Granby Street
Norfolk 10, Virginia

LOUIS B. FINE AND HOWARD I. LEGUM
*Attorneys for Respondent*

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**In The**

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OCTOBER TERM—1959

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No. 358.

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*Respondent*

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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**BRIEF IN OPPOSITION TO**

**PETITION FOR WRIT OF CERTIORARI**

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## STATEMENT OF THE CASE

Ruth Holley, Administratrix of the Estate of Edward J. Holley, deceased, filed a libel against the SS Manfred Stansfield and its owner, REEDERE BLUMENFELD,

G.M.B.H., for damages for the wrongful death of her husband, Edward J. Holley. The libel alleged that the respondents failed to furnish decedent a safe place in which to work as a stevedore and also that the ship was unseaworthy.

The respondents impleaded Joseph C. Jett, the charterer, who impleaded Elizabeth River Terminals, Inc., the stevedore, which impleaded F. S. Royster Guano Company, Inc.

The District Court heard the case on August 1st and 4th, 1958. On September 25, 1958, the Court handed down an opinion dismissing the libel on the ground that decedent was guilty of contributory negligence which barred recovery for his wrongful death. An order was entered on October 10, 1958, dismissing the libel.

The Court of Appeals for the Fourth Circuit heard argument on April 10, 1959. On July 9, 1959 the Court of Appeals reversed and remanded the case to the District Court.

## FACTS

William J. Edmonds, the superintendant of Elizabeth River Terminals, South Norfolk, Virginia, inspected the SS Manfred Stansfield, on September 13, 1956, when it arrived there (Tr. p. 35). The cargo consisted of potash which was very hard and part of it had been removed from the square of No. 2 hatch (Tr. p. 36). The remainder of potash in the No. 2 hatch was in the wings, and also fore and aft of the square of the hatch (Tr. p. 36). He immediately requested permission of the master of the ship to use small charges of dynamite in order to loosen it for

safer discharge and permission was refused (Tr. pp. 37, 38). The dynamite would have knocked the potash from the wings of the holds, which was anywhere from 12 feet to 20 feet high, to the floor (Tr. p. 38).

Because of the refusal by the master to use the dynamite it was necessary to use picks and air hammers and payloaders (Tr. p. 39). Decedent was an operator of a payloader (Tr. p. 39) which was used on the floor of the No. 2 hatch to bring the loosened potash from the wings to the square of the hatch where the grab bucket picked the potash and removed it from the ship (Tr. p. 39).

On September 17, 1956, there were two payloader operators in the No. 2 hatch, to-wit: decedent and a man named Horace L. Blount, and there were 6 or 8 longshoremen in the hold (Tr. p. 40). R. B. Ives was the foreman and Daniel Johnson was the gang boss (Tr. p. 41). Mr. Edmonds did not see the accident.

He had used dynamite many times with the permission of the masters and considered it a safe practice (Tr. pp. 42, 43).

Randolph B. Ives, the foreman for Elizabeth River Terminals which was discharging the potash, was in the No. 2 hold about ten minutes before the accident (Tr. p. 62). He observed the decedent operating the payloader and saw nothing dangerous to indicate that the potash was going to fall (Tr. p. 63). He estimated that the potash was 20 to 25 feet high in the wings of the No. 2 hold when the ship arrived on September 13, 1956 (Tr. p. 65). He testified that longshoremen were working with picks and air hammers from the top of the potash, and the operators of the payloaders would not be in a position

whereby the potash would fall on them (Tr. p. 66). He wanted to use dynamite in order to loosen the potash but the master of the ship only permitted one CO-2 charge to be used on the port side of the No. 2 hold (Tr. p. 64). He arrived in the hold three minutes after the accident and saw the longshoremen taking the decedent off of the payloader (Tr. p. 62). Mr. Ives testified affirmatively that it did not appear that decedent had dug a cave out of the potash and that the overhang had not come down from it (Tr. p. 70). He testified that the payloader necessarily has to dig in the bottom (Tr. p. 72). He testified that if dynamite was used to loosen up the potash there would not be an overhang (Tr. p. 70).

Daniel Johnson, the gang boss in the No. 2 hold on September 17, 1956, had seen the decedent operate the payloader before the accident and he did not notice anything about the potash indicating that it was going to fall (Tr. p. 84).

Horace L. Bloum, the operator of the other payloader in the No. 2 hold, testified that decedent's payloader did not hit the potash at the time it fell down upon him (Tr. p. 92). He testified that decedent was operating the payloader in the usual manner (Tr. p. 95).

W. W. Kelly, who is a safety engineer for Naval Supply Center, Norfolk, Virginia, testified that potash should be trimmed in order to distribute it equally throughout the holds or tween deck (Tr. pp. 97, 105, 106). He testified that it is improper to stow bulk cargo which has been removed from the square of the hatch, with potash from 12 to 25 feet high in the wings (Tr. p. 107). It is an unsafe practice for the ship to go from one port to another in an untrimmed condition (Tr. p. 113). Dynamiting is the

safe accepted practice (Tr. p. 114). A ship leaving port without its cargo being trimmed is unstable (Tr. p. 117). If cargo is untrimmed when it arrives in port, it continues to remain untrimmed until the time it is discharged unless dynamiting is used (Tr. p. 118). The safe and accepted manner to discharge untrimmed potash is to use dynamite (Tr. p. 119). Dynamiting, by trimming the cargo, makes for safe discharge. If cargo is not trimmed it is unsafe for men to work (Tr. pp. 125, 126). If dynamiting is used there cannot be any overhang because the entire cargo would have fallen down in the hatch (Tr. pp. 130, 131). The master of the ship was responsible for the trimming of cargo (Tr. p. 134).

William T. Bishop, a waterfront safety specialist for the United States Navy, testified that the purpose of trimming a ship is to make it a safe working place for stevedores and to prevent cave-ins (Tr. p. 167). It is a safe method to use dynamite to trim a cargo of potash (Tr. p. 173).

William J. Edmonds testified that at the time of the accident the port side of the No. 2 hatch had already been cleaned out and that decedent was in the corridor between the No. 2 and No. 3 hatches in the starboard side of the ship (Tr. p. 189). 28 hours of discharge remained in the hatch after the accident and 20 hours had been consumed prior to the accident (Tr. p. 189). The purpose of dynamiting was to bring the potash down to the floor of the ship where it can be picked up mechanically (Tr. p. 191).

Joseph Dziwulski, a foreman at the Rucker Terminal, Baltimore, Maryland, testified that the potash had been removed from the square of the hatch in Baltimore prior to the ship coming to South Norfolk, Virginia. He testified

that when the ship left Baltimore the cargo was not trimmed and there had been no instructions from the master or mate to trim it (Tr. pp. 226, 242).

Charles M. Cacace, who has been in the stevedoring business since 1918 and is the president of Marine Stevedoring Corporation, Norfolk, Virginia, testified that it is a safe customary practice to use dynamite to loosen up a cargo of potash. After the cargo is loosened up it makes it a safe place for the employees to work (Tr. 254, 256).

Aaron Peed, a longshoreman who was working in the No. 2 hold at the time of the accident, testified that decedent was operating a payloader in the usual manner (Tr. p. 265, 267). He heard the big lump of potash fall and it was the size of a desk (Tr. p. 265). Nobody at the time of the accident was working at the top of the potash (Tr. p. 266). He testified that it was necessary to use dynamite because the potash was so hard and that the use of dynamite would make it safe for the workers. He was present when the captain of the vessel refused permission to use dynamite (Tr. p. 267, 270). Aaron Peed testified that decedent was not digging at the time the lump of potash fell upon him (Tr. p. 274). He testified that the payloader has to cut under the potash because it is the only way to dig it out (Tr. p. 274).

Andrew Wilson, a stevedore, saw the piece of potash fall upon decedent (Tr. p. 287). He testified that no one was working on the top of the potash at the time of the accident and that decedent was not hitting the potash with the payloader at the time of the accident (Tr. p. 287).

Andrew Wilson had seen dynamite used on other occasions to loosen up potash (Tr. p. 285).

Lloyd B. Owens, a stevedore who had unloaded many ships containing potash, testified that it is customary to use dynamite to loosen up potash (Tr. p. 303).

Decedent was 31 years of age at the time of his death and in good health, earning $65.00 per week (Tr. pp. 313, 314).

Ernest E. Ball, vice-president of Elizabeth River Terminals testified that the cargo of potash appeared to be harder than usual (Tr. p. 360). The holds were excessively cut down directly in the square of the hatch beyond usual cargoes (Tr. p. 360). He complained to the master about the hazardous conditions (Tr. p. 362).

## QUESTION PRESENTED

Petitioner, on Page 2 of its brief, presents the following question:

In Admiralty action brought by administratrix of deceased longshoreman against vessel owner under Virginia Death by Wrongful Act Statute is contributory negligence of decedent an absolute bar to recover or merely to be considered by the Court in mitigating damages assessed against vessel owner?

## ARGUMENT

### 1. The Decision of the Court of Appeals for the Fourth Circuit does not Conflict with the Decision of any other Circuit Court of Appeals Construing the Virginia Death by Wrongful Act Statute.

Petitioner alleges that the decision of the Court below is directly in conflict with the decision of the Courts of Appeals for the Third Circuit, Fifth Circuit, and Sixth Circuit. We submit that there is absolutely no conflict amongst the Circuits, for the reason that the cases cited in petitioner's petition do not construe the Virginia Death by Wrongful Act Statute. The cases construe the Pennsylvania, Texas and Kentucky Statutes which differ from the Virginia Statute.

It is interesting to note that in the case of *Curtis* v. *Garcia Y. Cia*, 3rd Cir., 241 F. 2d 30, recovery was allowed the administratrix of a longshoreman under the Pennsylvania Survival Statute and the Court held that the maritime rule of comparative negligence was applicable and that the longshoreman's contributory negligence would not bar recovery.

The Court of Appeals for the Fourth Circuit pointed out that the decisions of the Third Circuit applying the Pennsylvania Wrongful Death Statute dealt with a statute different from Virginia's and were decided prior to the case of *The Tungus* v. *Skovgaard*, 358 U. S. 588.

The Court of Appeals for the Fourth Circuit did not apply the general admiralty law but construed the Virginia Wrongful Death Statute, Section 8-633 of the Code

of Virginia. The Court pointed out that the Supreme Court of Appeals of Virginia has not held contributory negligence a complete bar to recovery in a wrongful death action where the maritime doctrine of comparative negligence would have controlled if death had not ensued. The Court interpreted the Virginia statute to include the rule of comparative negligence where the injury resulting in death occurs on navigable waters of the state.

The Court further held that the Supreme Court of Appeals of Virginia would hold that the statute was intended not only to take away from the wrongdoer the common law immunity resulting from the death of the injured party, but to grant recovery in all instances where a decedent would have recovered.

2. EACH CASE MUST BE DECIDED UNDER THE DEATH BY WRONGFUL ACT STATUTE OF THE STATE WHERE THE TORT OCCURS.

Petitioner, at Page 5 of its brief, alleges that there should be uniformity among the various circuits, which does not now exist. If petitioner means that each state, regardless of the differences in the terminology of the Death by Wrongful Act Statute should hold that contributory negligence is a bar to recovery for a maritime tort within a state, then we submit that the argument is erroneous. State law controls and there is no uniform statute in all of the states requiring the same holding.

The error in petitioner's argument is that there is no case, decided by any state court or by any federal court, construing the *Virginia* statute in a manner different from the holding of the Court of Appeals for the Fourth Circuit

in this case under this set of facts. Hence there is no conflict amongst the Circuits pertaining to the interpretation of the Virginia statute.

3. THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT IS NOT IN CONFLICT WITH THE CASE OF THE TUNGUS V. SKOVGAARD, 358 U.S. 588.

The Court below specifically referred to and followed the case of *The Tungus* v. *Skovgaard*, 358 U.S. 588.

In *The Tungus* v. *Skovgaard*, 358 U.S. 588, the court said:

> "Yet, the fact is that the New Jersey courts have simply not spoken upon the question of whether in a case such as this maritime law or common law is applicable under the State's Wrongful Death Act. In sum, there is no way of knowing whether New Jersey would impose uniform legal standards throughout its jurisdiction, or would apply in this case rules different from those that would govern if, instead of meeting his death aboard the Tungus, Skovgaard had been killed on the adjacent dock."

Mr. Justice Stewart, speaking for the majority, concluded:

> ". . . The Court of Appeals, en banc, has given careful consideration to the meaning of the State statute. We cannot say that its conclusion is clearly wrong. Therefore, despite the inherent uncertainties involved, we will not disturb that court's interpretation

of the New Jersey law. Such a course is consistent with the practice that has been followed in the past. Estate of Spiegel v. Commissioner, 335 U.S. 701, 707-708, 69 S. Ct. 301, 303-304, 93 L. Ed. 330; Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 534, 69 S. Ct. 1233, 1235, 93 L. Ed. 1520; General Box Co. v. United States, 351 U.S. 159, 165, 76 S. Ct. 728, 732, 100 L. Ed. 1055."

## CONCLUSION

It is respectfully submitted that, in addition to the argument above, the petition for a writ of certiorari should be denied under the holding of *Ragan* v. *Merchants Transfer Co.*, 337 U.S. 530, 534, where the court stated:

> "We ordinarily accept the determination of local law by the Court of Appeals (See Huddleston v. Duyer, 322 U.S. 232, 237), and we will not disturb it here."

It is respectfully submitted that the decision of the Court of Appeals for the Fourth Circuit construing the Virginia statute does not conflict with the decisions of the Court of Appeals for the Third, Fifth and Sixth Circuits, which construed statutes other than Virginia.

It is urged that the petition be denied.

FINE, FINE, LEGUM, WEINBERG & SCHWAN

LOUIS B. FINE AND HOWARD I. LEGUM,

*Attorneys for Respondent.*